Setting the record straight how detention and indictment works in Sweden – as illustrated by the Assange case

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In a recently published text, Nils Melzer, UN Special Rapporteur on Torture, Human Rights Chair, Geneva Academy and Professor of International Law at the University of Glasgow, felt “repulsion and disbelief”, starting off with stating that Assange “has never been charged with a sexual offence” in Sweden. If one’s understanding of criminal procedure is based only on English law or common law, this is a serious allegation, if you are arrested in the UK you have to be charged within 24 hours. This account implies that the Swedish authorities have decided to seek Assange’s detention and extradition to Sweden without giving the grounds for these actions. It would suggest that Sweden is a lawless society.

However, if one accepts that different countries and legal systems may offer the same legal safeguards without necessarily using the same language (English), one will soon understand that Assange has received due notification for the grounds for which the Swedish authorities have sought his detention and extradition. I have previously explained this in response to questions posed by journalists from the UK, colleagues in UK, by legal practitioners as well as academics. Generally, there has not been much need to explain this since most understand that different countries use different terms. Considering that Nils Melzer has a senior position in academia and in the UN system, I feel the need to write this blog post in order to prevent any further misunderstandings in this regard. Sweden, as any country, has its flaws. However, it is still a country where the rule of law is strong. Assange has been given the reasons by Swedish authorities for the decisions seeking his detention and requesting his extradition.

First, we need to find a common ground on how to compare different legal systems since Melzer appears to analyse Swedish law (which is a civil law country) through a common law lens. Anita Frohlich has explained that when comparing different legal system one should take three steps: (1) state the problem in purely functional terms, without being influenced by one’s own legal system; (2) examine how the different legal systems resolve the legal problem; (3) compare and evaluate how the different systems deal with the problem. I have similarly argued – in a text not dealing with the Assange case – when comparing a procedural feature in different legal systems that this should not be done “on the basis of its formal designation, but rather on what real and potential situations it aims to solve” (Klamberg, 2013, p. 15).

Turning to the matter at hand, charging.

According to English law, if you have been arrested, the police can detain you in custody for a maximum of 24 hours before they must either charge you with the offence, release you under police bail to return at a later date for further questioning, or release you without charge. The police can keep you in custody for 96 hours (4 days). After that, further detention has to be reviewed by a judge.

Chapter 24, section 9 of the Swedish code of judicial procedure provides that "When a person is apprehended or arrested or when an order for arrest under Section 8, first paragraph is executed, he shall be informed of the offence for which he is suspected and the grounds for his arrest."

If the police and prosecution want to keep the person detained for a period longer than 4 days, a request must be made to and reviewed by a court (see Chapter 24, section 13). Chapter 24, section 14 of the Swedish code of judicial procedure provides that "The person (the prosecutor) who requests the detention shall state the grounds upon which the request is based.

Thus, the legal safeguards in Sweden and UK appear almost identical. This is no coincidence. Many of these safeguards follow from the fact that both countries are parties to the European Convention on Human Rights. The only difference is the language, not the substance. While English law uses the term "charge", Swedish law uses the phrase "offence for which he is suspected and the grounds for his arrest".

The European Court of Human Rights has in its case law explained the following.

"63. The Court reiterates that under Article 5 § 2 of the Convention any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5 § 4. Whilst this information must be conveyed promptly, it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features. Moreover, when a person is arrested on suspicion of having committed a crime, Article 5 § 2 neither requires that the necessary information be given in a particular form, nor that it consists of a complete list of the charges held against the arrested person. Furthermore, when a person is arrested with a view to extradition, the information given may be even less complete. However, this information should be provided to the detained in an adequate manner, so that the person knows why he has been deprived of his liberty" (Nowak v. Ukraine, Application no. 60846/10, Judgment 31 March 2011, para. 63)

Thus, the important requirement is that Assange is informed of the grounds for the decision to detain him. The detention of Assange has been reviewed several times by Swedish courts. Each time the prosecutor has to give the detained and the courts reasons, including what crimes Assange is suspected of. This has been reviewed several times by courts at lower instance and, in addition, two times by the Supreme Court of Sweden (2 September 2010 and 11 May 2015): The request for extradition was reviewed by British courts, including the UK Supreme Court (20 May 2012). There is no uncertainty concerning the offences which Assange is suspected to have

committed. He has been formally notified and the measures have been reviewed by courts at all levels.

Lastly, some words about the concept of “indictment”, it is a term used both in Swedish and English law. The indictment comes at the very end of the investigation in Sweden. When the investigation is completed, the suspect is formally notified and given a copy of the prosecutor’s case file (including the evidence). The accused is given the opportunity to add information or to ask the prosecutor to conduct further investigations. Once this is completed, the prosecution may issue the “institution of the prosecution” which is the indictment (in Swedish: stämningsansökan). If the accused is detained the idea is that the trial in court should start very soon, within, two weeks. This is done in the interest of the accused since he or she should be presumed to be innocent and since defendant has the right to an expeditious trial.

Chapter 45, section 14 (in Swedish, the provision has been updated, the translation to English is old, now with a two-week time limit) provides the following.

“If the defendant is under arrest or in detention, the main hearing shall be held within two weeks from the date of the institution of the prosecution”

The procedural framework for serving the indictment assumes that the detained person who is about to go to trial is in Sweden and in the custody of the police, not in another country or taking refuge in an embassy. That is why the Swedish prosecutor closed the case 19 May 2017. It was very difficult to take the procedural steps necessary before an indictment could be served.

The English courts have understood and accepted this. They understand that England is not the only country in the world offering due process and they understand that we (outside of the UK) do not need to transplant English terminology into our laws. On a personal note, I appreciate that the English judges did not adopt a British colonial and imperialist approach when evaluating the legal system of Sweden. On 2 November 2011, the English High Court Of Justice, Queen’s Bench Division, Divisional Court, wrote the following (para. 153):

“Although it is clear a decision has not been taken to charge him, that is because, under Swedish procedure, that decision is taken at a late stage with the trial following quickly thereafter. In England and Wales, a decision to charge is taken at a very early stage; there can be no doubt that if what Mr Assange had done had been done in England and Wales, he would have been charged and thus criminal proceedings would have been commenced. If the commencement of criminal proceedings were to be viewed as dependent on whether a person had been charged, it would be to look at Swedish procedure through the narrowest of common law eyes. Looking at it through cosmopolitan eyes on this basis, criminal proceedings have commenced against Mr Assange.”

Now, what is the correct description of the stage of proceedings against Assange in Sweden? Assange is still a suspect for alleged rape in Sweden and he has been formally notified of this. In contrast to how it was until 2017, there is not at present a decision authorising his arrest. On 3 June 2019 the Uppsala District Court decided

that there is probable cause for the suspicion of rape, less serious incident, and that there is a risk that Julian Assange will “fail to appear or in some other way avoid participation in the investigation and the following proceedings”. However, the district court decided not to issue a decision order “[s]ince Julian Assange is serving a prison sentence the public prosecutor can proceed with the preliminary investigation by issuing a European Investigation Order.” Once the Swedish investigation is completed, the Swedish prosecutor may choose to seek Assange’s surrender to Sweden with the assistance of UK authorities, to issue the indictment and summons to appear in court in Sweden for trial.

There are several relevant objections that Assange can make in relation to requests for extradition from the USA and to some extent in relation to the request from Sweden, but the different terminology used in Swedish and English law is not one of them.

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